Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2000

Dora B. Schriro,
Petitioner,

v.

Francis Kamuf,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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28pp

QUESTION PRESENTED

Does the Prison Litigation Reform Act, which states that "[n]o action shall be brought" by an inmate in federal court until available administrative remedies are exhausted, 42 U.S.C. § 1997e(a), require a federal court to dismiss a prisoner's action filed before those remedies are exhausted, even if exhaustion occurs before entry of a judgment of dismissal?

PARTIES TO THE PROCEEDING

Petitioner Dora Schriro is the Director of the Missouri Department of Corrections, and was the appellee in the judgment for which review is sought.

Respondent Francis Kamuf was the appellant in the judgment for which review is sought, which is court of appeals docket number 99-3088. (Appendix ["App."] at A-6.) That appeal was consolidated with the separate appeal of plaintiff Gerald Porter (Docket Number 99-3087) for purposes of opinion. *Id.* Petitioner does not seek review of the court of appeals judgment in number 99-3087.

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No. _____

In the
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Dora B. Schriro,

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On Petition for Writ of Certiorari
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for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Dora B. Schriro, in her official capacity as the Director of the Missouri Department of Corrections, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals reversing in part the district court's dismissal of the underlying suit (Appendix ["App."] at A1-2), filed May 15, 2000, and the court's order denying rehearing and rehearing en banc, entered July 19, 2000 (App. at A9), are not reported. The order of the district court granting petitioner's motion to dismiss (App. at A3-8), filed May 4, 1999, is not reported.

JURISDICTION

The court of appeals entered its judgment on May 15, 2000 (App. at A1), and entered its order denying petitioner's Petition for Rehearing and Rehearing En Banc on July 19, 2000 (App. at A9). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISION INVOLVED

Title 42 U.S.C. § 1997e(a) (Supp. IV 1998):

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

INTRODUCTION AND STATEMENT

Congress enacted the Prisoner Litigation Reform Act (PLRA) in an attempt to control the explosive growth in the volume of prisoner litigation in the federal courts and to reduce the role that federal courts played in the day-to-day

administration of the nation's prisons. One of the most important aspects of this legislation was modeled on a step taken in a variety of other federal laws, such as the Federal Tort Claims Act (FTCA): to require that inmate plaintiffs defer filing suit until they had pursued available administrative grievance procedures. In this case, the Eighth Circuit held that district courts must excuse the failure to exhaust such remedies before suit is filed, so long as that failure is remedied before the case is dismissed. That holding is contrary to the unambiguous language of the PLRA. It is inconsistent with this Court's holdings as to the effect of similar provisions in the FTCA and elsewhere. And it directly conflicts with decisions of the U.S. Courts of Appeals for Fifth, Sixth, Seventh, and Eleventh Circuits.

The suit underlying this appeal was filed by seven inmates incarcerated within the Missouri Department of Corrections ("Department"), challenging the Department's drug testing procedures. The district court, which construed the claim as one arising under 42 U.S.C. § 1983, had jurisdiction under 28 U.S.C. § 1331. Petitioner Dora Schriro, the Department Director, moved to dismiss the suit because the plaintiffs had not exhausted their administrative remedies before they brought suit, as 42 U.S.C. § 1997e(a) requires. The trial court ordered briefing on the exhaustion issue, then, nearly one year after suit was brought, granted the motion and dismissed the suit without prejudice to refiling after exhaustion of administrative remedies was complete. App. at A7. In its order dismissing the case, the court rejected inmate Kamuf's argument that he had complied with the exhaustion statute, finding that, although inmate Kamuf had initiated the grievance procedure, he had not exhausted that procedure, if at all, until after he filed suit. App. at A7.

Of the original plaintiffs, only inmates Porter and Kamuf appealed. On May 15, 2000, prior to briefing, the court of appeals affirmed the trial court's judgment as to inmate Porter, but reversed it as to Kamuf. App. at A3.[1] Though not disputing the district court's explicit finding that inmate Kamuf had not exhausted the available remedies prior to filing suit, the court concluded that because the inmate had exhausted those remedies by the time the case was dismissed, he should be allowed to proceed on the merits. *Id.* In reaching this conclusion, the court of appeals relied on *Williams v. Norris*, 176 F.3d 1089, 1090 (8th Cir. 1999) (per curiam), where the court had determined, without explanation, that the PLRA's exhaustion requirement was satisfied so long as exhaustion occurred prior to dismissal. App. at A2.

On July 19, 2000, an evenly divided court denied rehearing en banc. App. at A9.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's rule permitting inmate lawsuits to go forward, even if the suits were brought before available administrative remedies were exhausted, is directly contrary to the plain language Congress used in § 1997e(a) to defer involvement of the federal courts in intraprison disputes. It ignores this Court's decision in *McNeil v. United States*, 508 U.S. 106 (1993), which involved a substantively identical administrative exhaustion statute, and burdens the federal courts with inmate lawsuits that are premature in the same way as the

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[1]The opinion was not published. But unpublished panel opinions are binding on subsequent panels of the Eighth Circuit; such opinions may only be overruled or modified by the court en banc. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000).

FTCA actions at issue in *McNeil*. The decision below thus undermines the central purpose of the Prison Litigation Reform Act by encouraging federal court litigation of matters that might otherwise have been resolved within the prison administrative process. And because it is directly contrary to the decisions of the United States Courts of Appeals for the Fifth, Sixth, Seventh and Eleventh Circuits, the decision also perpetuates an irreconcilable conflict among the circuits regarding the interpretation of § 1997e(a).

This petition should be granted to reconcile these conflicting approaches and to insure a uniform and effective national interpretation of § 1997e(a), which applies to almost all of the more than twenty-five thousand prisoner lawsuits filed in United States district courts each year.

1. The Prisoner Litigation Reform Act was passed to curb the "alarming explosion" of inmate litigation. 141 Cong. Rec. S14,413 (daily ed. September 27, 1995) (statement of Sen. Dole). To that end, the Act, among other things, diverted inmate claims first into administrative channels. The PLRA's predecessor included a weaker exhaustion provision. It merely codified the courts' inherent authority by specifying that they could "continue [a] case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available." 42 U.S.C. § 1997e(a) (1994). The PLRA significantly strengthened the exhaustion requirement by compelling "State prisoners to exhaust all administrative remedies before filing a lawsuit in Federal court." 141 Cong. Rec. at S14,414 (statement of Sen. Dole). Thus the PLRA replaced the prior language permitting that cases be filed, but then held in abeyance, with language that is unambiguously mandatory: "No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison,

or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (Supp. IV 1998).

This Court has held repeatedly that federal courts must defer to Congress's power to regulate the procedural preconditions to filing suit in federal court, deference that requires courts to fashion "exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). Thus where a statute mandates exhaustion, that requirement must be enforced. *Id.* Where, as here, the legislative command requiring exhaustion is unambiguous, the judiciary is "not free to rewrite the statutory text"; instead, "'strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *McNeil*, 508 U.S. at 113 (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)).

The statutory text here is clear: it absolutely prohibits any "action" from being "brought . . . until" administrative remedies are exhausted. Under the Federal Rules of Civil Procedure, a civil action is "commenced" upon filing. Fed. R. Civ. Proc. 3. In such contexts, this Court has held that terms such as "brought" or "instituted" mean the same thing as "commenced." *See McNeil*, 508 U.S. at 112 ("instituted" is synonymous with "commenced"); *Goldenberg v. Murphy*, 108 U.S. 162, 163 (1883) ("brought" is synonymous with "commenced"). *See also Hallstrom v. Tillamook County*, 493 U.S. 20 (1989) (statute uses "commenced"). Whether Congress chose "commenced," "instituted," or "brought," its meaning is plain: inmates cannot file suit in federal court until they have exhausted their administrative remedies.

2. This Court has twice considered whether statutes like § 1997e(a) permit administrative exhaustion after filing, but prior to decision. The Court has twice answered, "No." The Eighth Circuit's "yes" answer in this case conflicts with those precedents – and with the holdings in other circuit courts of appeals – to a degree that merits review by this Court.

The closest parallel to this case is *McNeil v. United States*, where both the statutory exhaustion requirement and the factual scenario are substantively indistinguishable from those at issue in this case. In *McNeil*, this Court considered the Federal Tort Claims Act's exhaustion requirement, which provided that "'an action shall not be instituted upon a claim against the United States for money damages' unless the claimant has first exhausted his administrative remedies." 508 U.S. at 107 (quoting 28 U.S.C. § 2675(a) (1988)). The plaintiff, an Illinois inmate, filed a *pro se* complaint under the FTCA before initiating the appropriate administrative procedure by submitting a claim to the Department Of Health and Human Services. *Id.* at 108. By the time the action was dismissed because it had been prematurely filed, the claim had been considered and rejected by the agency–even before the United States was served with the complaint. *Id.* at 109.

This Court nonetheless affirmed the dismissal, holding that because the statutory command that an "action shall not be instituted . . . unless the claimant shall have first" exhausted administrative remedies was "unambiguous," the Court could not "rewrite the statutory text" to excuse premature filing of a complaint based on subsequent exhaustion of remedies. *Id.* at 112. Congress had intended by its language to require "complete exhaustion . . . before invocation of the judicial process." *Id.* Each premature filing put some burden on the Government to defend such actions. *Id.* Though the burden may be slight in each individual case, collectively it was

potentially large. *Id.* The Court concluded that orderly administration of this sort of litigation was served by adherence to the statute's "straightforward . . . command." *Id.*

In requiring a strict adherence to the straightforward language of a statute requiring administrative exhaustion, *McNeil* followed the path laid out in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989). There, this Court interpreted another administrative exhaustion statute that uses language nearly identical to § 1997e(a). The Resource Conservation and Recovery Act, 42 U.S.C. § 6972(b)(1) (1982), mandated that "[n]o action may be commenced . . . prior to sixty days after the plaintiff has given notice of the [RCRA] violation" to the Environmental Protection Agency, to the state where the violation occurs, and to the alleged violator. *Id.* This Court, holding that the statutory language "could not be clearer," *id.* at 26, rejected the argument that the exhaustion requirement could be satisfied in prematurely filed suits merely by staying proceedings until the sixty-day period had elapsed. *Id.* at 26-29. Staying proceedings to allow the statutory exhaustion period to elapse, the Court held, does not honor Congress's prohibition against premature suits, and frustrates the provision's goal of encouraging enforcement of environmental regulations by the appropriate administrative agencies in the first instance, before resort to the federal courts. *Id.* at 27-29. This Court concluded instead that "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 31. On that basis, this Court ordered that the case, which had been actively litigated for nearly four years, be dismissed, without prejudice to refiling after the notice and delay provisions were fulfilled. *Id.* at 32.

This Court's holdings in *McNeil* and *Hallstrom* apply with even greater force to the PLRA's exhaustion requirement.

The language of the PLRA is no less straightforward than its FTCA and RCRA predecessors. And just as the Court noted in *McNeil* that the underlying purpose of the FTCA exhaustion statute was to "reduce unnecessary congestion in the courts," the PLRA's central purpose was to relieve both the federal courts and State officials of the excessive burden that litigation of inmate claims imposes:

> Frivolous lawsuits filed by prisoners tie up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens. The time and money spent defending these cases are clearly time and money better spent prosecuting violent criminals, fighting illegal drugs, or cracking down on consumer fraud.

141 Cong. Rec. S14,414 (daily ed., September 27, 1995) (Statement of Sen. Dole). The rule established below, however, instead endorses for district courts in the Eighth Circuit the approach that Congress once permitted, but repealed: to accept a pre-exhaustion filing, but then defer action until exhaustion was complete. *See* p. 5, *supra*. Just like the accept-filing-but-delay-action approach this Court rejected in *Hallstrom*, it severely undermines the purpose and effect of the PLRA.

3. The plain language of § 1997e(a), and the *McNeil* and *Hallstrom* holdings, led the Fifth, Sixth, Seventh and Eleventh Circuits to explicitly reject the contention that § 1997e(a) allows exhaustion of administrative remedies after suit is brought, but before judgment. *Freeman v. Francis*, 196 F.3d 641, 645 (6th Cir. 1999); *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532, 535 (7th Cir. 1999); *Underwood v. Wilson*, 151 F.3d 292, 295-96 (5th Cir. 1998); *Harris v. Garner*, 216 F.3d 970, 974 (11th Cir. 2000) (en banc). In those circuits,

the courts and state officials receive the full benefits of the PLRA's exhaustion requirement.

By requiring exhaustion of administrative procedures prior to filing suit, the PLRA preserves judicial time and resources in those circuits in two ways. First, it resolves some disputes without any judicial action. As Judge Easterbrook pointed out in *Perez*, 182 F.3d at 537-38, administrative remedies give executive officials the opportunity to examine and correct their own conduct, possibly preventing resort to litigation. Second, administrative processes promote efficient litigation even of those inmate claims that are eventually decided in court, by narrowing and defining the scope of those claims before suit is filed. *Id.*

In any particular case, of course, the benefits of an exhaustion requirement may be small. But in enacting the PLRA, Congress was concerned not with individual suits, but with the cumulative burden of inmate suits on the United States courts. And the total burden on the federal court system and on the States of minimizing the exhaustion rule is potentially huge. Even with the PLRA fully in effect, in 1999 alone inmates filed more than 25,000 civil rights and prison conditions cases in federal district courts – about ten percent of all civil cases filed in that year. Statistics Division, Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 1999 Report of the Director* 137. Within the Eighth Circuit, prisoner lawsuits covered by the PLRA still make up more than fifteen percent of all privately filed civil cases. *Id.* at 145. The § 1997e(a) exhaustion requirement applies, at least potentially, to nearly every one of these cases.

Moreover, the proper application of this section affects not only the courts, inmates, and prison officials who are directly involved in prisoner litigation, but also others who

compete with inmates for the courts' limited time and resources. Because of the conflict between the decision of the Eighth Circuit and those of other circuit courts of appeals, litigants in the Eighth Circuit must compete with a drain on judicial resources that litigants in other circuits avoid. That inequity merits attention by this Court.

CONCLUSION

For these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October, 2000

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-3087

Roger Johnson; Ronald Farmer; Curt Brink; Christopher Trail,
Plaintiffs,

Gerald Porter,
Appellant,

Francis Kamuf; Willie Wright, and all those prisoners similarly situated within the Missouri Department of Corrections or held by officers or agents of the State of Missouri who are affected by this litigation,
Plaintiffs,

v.

Dora B. Schriro, Superintendent; Michael Groose; Lynda S. Taylor; Steven E. Moore, Darin Morgan,
Appellees.

Appeals from the United States District Court
for the Western District of Missouri

No. 99-3088

Roger Johnson; Ronald Farmer; Curt Brink; Christopher Trail, Gerald Porter,
Plaintiffs,

Francis Kamuf,
Appellant,

Willie Wright, and all those prisoners similarly situated within the Missouri Department of Corrections or held by officers or agents of the State of Missouri who are affected by this litigation,
Plaintiffs,

v.

Dora B. Schriro, Superintendent; Michael Groose; Lynda S. Taylor; Steven E. Moore, Darin Morgan,
Appellees.

[UNPUBLISHED]
Submitted: May 5, 2000
Filed: May 15, 2000

Before McMILLIAN, RICHARD S. ARNOLD, and HANSEN, Circuit Judges.

PER CURIAM.

Gerald Porter and Francis Kamuf, Missouri inmates incarcerated at the Western Missouri Correctional Center (WMCC), appeal the district court's order dismissing their complaint without prejudice for failure to exhaust administrative remedies. Appellants also move to proceed in forma pauperis (IFP) on appeal. We grant them permission to proceed IFP, leaving the fee-collection details to the district court in accordance with 28 U.S.C. § 1915(b).

Further, after careful review of the record, we affirm the judgment of the district court as to Porter, because the record reveals that he has not exhausted his administrative remedies as required by the Prison Litigation Reform Act. However, we reverse the judgment of the district court as to Kamuf, and

remand so that he may proceed on the merits, because he exhausted his administrative remedies before the district court dismissed the complaint. *See Williams v. Norris*, 176 F.3d 1089, 1090 (8th Cir. 1999) (per curiam).

Accordingly, we grant appellants' requests to proceed IFP on appeal; and we affirm the judgment of the district court in part, reverse in part, and remand for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

No. 98-6094-CV-SJ-9-P

ROGER JOHNSON, et al.,
Plaintiffs,

v.

DORA SCHRIRO, et al.,
Defendants.

ORDER DISMISSING CASE WITHOUT PREJUDICE

[Filed: May 4, 1999]

This is a civil rights complaint pursuant to 42 U.S.C. § 1983, which was filed pro se on May 28, 1998, by seven plaintiffs who are incarcerated at the Western Missouri Correctional Center ("WMCC") in Cameron, Missouri. Although plaintiffs' complaint initially was filed as a petition for a writ of habeas corpus, I construed it as civil rights complaint due to the nature of the case and the relief sought. Currently pending are defendants' motion to dismiss (Doc. No. 42), plaintiffs' response to defendants' motion to dismiss (Doc. No. 52), plaintiff Kamuf's response to defendants' motion to dismiss (Doc. No. 59), defendants' reply to plaintiffs' responses (Doc. No. 58), plaintiffs' motion for class action certification (Doc., No. 62), and defendants' response to plaintiffs' motion for class action certification (Doc. No. 66), plaintiff Kamuk's[sic] motion to enter additional exhibits, etc.

(Doc. No. 77), and plaintiff's[sic] Kamuf's motion to enter additional exhibits (Doc. No. 78). Although Rashid Walker filed a separate motion for class action certification, his previous motion to join as a plaintiff in this case was denied (Doc. No. 44).

Plaintiffs are inmates Roger Johnson, Curt Brink, Ronald Farmer, Francis Kamuf, Gerald Porter, Christopher Trail, and Willie Wright. Although James Gill, Gregory Abbott, Jeffrey Hartman, and Maurice Smith signed the initial complaint, they have not been considered to be plaintiffs in this case because they were not listed in the caption of the complaint. Doc. No. 1. Subsequently, Maurice Smith was denied leave to join the action when he moved to do so. Doc. No. 44.

Defendants are Missouri Department of Corrections Director Dora B. Schriro, Assistant Director Michael Groose, WMCC Associate Superintendent Steven Moore, WMCC Associate Superintendent Darin Morgan, WMCC Superintendent Lynda Taylor, and Does A-Z. In their complaint, plaintiffs allege various violations of their right to due process under the Fourth and Fourteenth Amendments to the Constitution. Specifically, they contend that the drug testing protocol used by the Missouri Department of Corrections ("MDOC") is so inaccurate and unreliable as to violate due process. Additionally, plaintiff Kamuf alleges that he was issued conduct violations for disobeying a direct order to urinate because he had a medically diagnosed bladder disorder. Plaintiffs seek declaratory and injunctive relief.

When considering a motion to dismiss for failure to state a claim, I must liberally construe the complaint in favor of the plaintiffs, accepting all material allegations of fact in the complaint as true. *May v. Commissioner of Internal Revenue*, 752 F.2d 1301, 1303 (8th Cir. 1985). I may dismiss a complaint

only if it is clear that the plaintiffs would be unable to prove any set of facts in support of their claim that would entitle them to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Dismissal of an action is warranted if the "allegations of constitutional violations are unsupported by sufficient facts to identify the nature of [the] alleged injury." *Yancey v. Alexander*, 724 F.2d 93, 94 (8th Cir. 1983).

In their motion to dismiss, defendants assert that plaintiffs have failed to exhaust administrative remedies as required by 42 U.S.C. § 1997e(a). Doc. No. 42. Plaintiffs respond that exhaustion is futile and that their claim is a non-grievable issue under MDOC regulations.

42 U.S.C. § 1997e(a) reads, in its entirety, as follows:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Although Section 1997e(b) states that a state is not required to adopt an administrative grievance procedure, Section 1997e(a) requires the exhaustion of administrative remedies that *are* available to the prisoner. "The Supreme Court has made clear that '[w]here Congress specifically mandates, exhaustion is required.'" *Alexander v. Hawk*, 159 F.3d 1321, 1326 (11th Cir. 1998) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)). "Since exhaustion is now a pre-condition to suit, the courts cannot simply waive those requirements where they determine they are futile or inadequate." *Id.* Therefore, if there are available administrative remedies, plaintiffs' claims cannot be considered until plaintiffs have exhausted those remedies.

In the instant case, there are grievance procedures available for the plaintiffs' use. *See* Missouri Department of Corrections and Human Resources Institutional Services Policy and Procedure Manual, IS8-2.1. In fact, plaintiffs have submitted several unexhausted grievance forms on which the issue clearly is regarded as a grievable issue by the MDOC. *See, e.g.*, Addendum to Doc. No. 52 (inmate grievance form regarding Christopher Trail). None of the plaintiffs exhausted the available administrative remedies before this case was filed. No facts have been presented that defendants rejected any grievance filed by plaintiffs on the ground that the issue was not grievable, including the additional exhibits submitted by plaintiff Kamuf in Doc. Nos. 77 and 78.

Although plaintiff Kamuf did not exhaust administrative remedies, Kamuf did pursue a grievance in accordance with the Missouri Department of Corrections and Human Resources Institutional Services Policy and Procedure Manual, IS8-2.1, Inmate Grievance Procedure. Doc. No. 76, Ex. 2. Plaintiff Kamuf's grievance appeal was filed on May 1, 1998. Doc. No. 69. This case was filed on May 28, 1998, three days before the MDOC's 30 day limitation for filing a response to the grievance appeal and several months before a decision was issued on the appeal. *Id.* at 11. Therefore, plaintiff Kamuf's grievance was not exhausted prior to filing.

This case will be dismissed without prejudice for failure to exhaust administrative remedies under 42 U.S.C. § 1997e(a).

Accordingly, it is **ORDERED** that:

(1) defendants' motion to dismiss (Doc. No. 42) is granted;

(2) this case is dismissed without prejudice; and

(3) all other motions (Doc. Nos. 55, 62, 64, 67, 77, and 78) are denied as moot.

/s/ D. Brook Bartlett
U.S. DISTRICT JUDGE

DATED: 5-4-99

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-3087WMSJ

Gerald Porter,
Appellant,

v.

Dora B. Schriro, etc., et al.,
Appellees.

The petition for rehearing en banc is denied. Judge Bowman, Judge Beam, Judge Loken, Judge Hansen and Judge Bye would grant the petition.

The petition for rehearing by the panel is also denied.

July 19, 2000

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit